Service Employees International Union, Local 87 (Able Building Maintenance Company) and Carlos Serrano. Case 20–CB–12510

February 23, 2007

DECISION AND ORDER

BY MEMBERS SCHAUMBER, KIRSANOW, AND WALSH

On November 16, 2006, Administrative Law Judge Mary Miller Cracraft issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, and to adopt the recommended Order dismissing the complaint.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. February 23, 2007

Peter C. Schaumber, Member

Peter N. Kirsanow, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[1] The General Counsel has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The General Counsel has excepted, inter alia, to the judge's failure to find that the Respondent violated Sec. 8(b)(1)(A) of the Act by breaching its duty of fair representation to Charging Party Serrano. We find this exception without merit because this theory of the violation was neither alleged in the complaint nor litigated at the hearing.

Shelley Brenner, Esq., for the General Counsel.
Jane Brunner, Esq., of Oakland, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

MARY MILLER CRACRAFT, Administrative Law Judge. The complaint[1] alleges that Service Employees International Union, Local 87 (Respondent or the Union) violated Section 8(b)(1)(A) and 8(b)(2) of the National Labor Relations Act[2] by requesting that Able Building Maintenance Company (ABMC) discharge its employee Carlos Serrano for a reason other than Serrano's failure to tender uniformly required initiation fees and periodic dues. More specifically, the complaint alleges that Respondent caused the discharge of Serrano pursuant to an internal union bylaw which prohibits members from working for more than one company covered by the collective-bargaining agreement between San Francisco Maintenance Contractors Association (SFMCA) and Respondent and/or from working simultaneously at two jobs in the same industry covered by the SFMCA contract.

All parties were afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue the merits of their respective positions. On the entire record, including my observation of the demeanor of the witnesses,[3] and after considering the briefs filed by counsel for the General Counsel and counsel for Respondent, I make the following findings of fact and conclusions of law.

I. FINDINGS OF FACT

During 2005, union member Carlos Serrano worked as a regular full-time employee at 425 Market Street.

Since 1984, Carlos Serrano (Serrano) has worked as a janitor in San Francisco, California, at 425 Market Street. Additionally, Serrano has been a member of the Union since 1984. Currently, his hours at 425 Market Street are from 6 p.m. to 1:45 a.m., Monday through Friday, for a total of 37.5 hours per week. This is considered full-time employment. Throughout Serrano's employment at 425 Market Street, various janitorial contractors have been awarded the janitorial contract for that building.

During 2005, the Union's multiemployer contract with SFMCA applied to employees working at 425 Market Street.

Prior to July 1, 2005, OneSource Building Services, Inc. provided janitorial services at 425 Market Street. OneSource was a party to the Union's multiemployer contract with SFMCA.

[1] This case was tried in San Francisco, California, on June 14 and July 20, 2006. The charge was filed by Carlos Serrano, an individual, on November 7, 2005, and amended on November 18, 2005, and January 31, 2006. The complaint issued on January 31, 2006, and was amended on May 31, 2006. All dates are in 2005, unless otherwise referenced.

[2] 29 U.S.C. Sec. 158(b)(1)(A) and (b)(2).

[3] Credibility resolutions have been made based upon a review of the entire record and all exhibits in this proceeding. Witness demeanor and inherent probability of the testimony have been utilized to assess credibility. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

This multiemployer contract applied to OneSource employees working at 425 Market Street. On July 1, ABMC took over the contract at 425 Market Street. ABMC was a party to the multiemployer contract and employees of OneSource continued to work for ABMC under the same contract.

During 2005, union member Carlos Serrano worked regular part-time hours at University of San Francisco (USF).

In September 2003, Serrano began working a second janitorial job, this one located at USF. He routinely worked regular hours on Saturday and Sunday and was on call from 4 to 8 a.m. during the week. At all relevant times, the janitorial contractor at USF was ABMC. Regarding his weekend hours, Serrano was a regular part-time employee of ABMC at USF.

During 2005, a single-employer contract between the Union and ABMC applied to ABMC employees at USF.

Although ABMC is a member of the multiemployer bargaining group SFMCA, it nevertheless has a single employer contract (the USF contract) with the Union covering its USF employees. The USF contract was effective from 2001–2005.

In October 2005, the Union approved a bylaw precluding union members from working for more than one company covered by the SFMCA contract and/or from working "simultaneously at two jobs in the same industry that are covered by the [multiemployer contract]." The purpose of this bylaw was to prevent inequities in employment opportunities.

On August 13, 2005, at a regular membership meeting of the Union, a proposed constitutional bylaw amendment to article XIV, section 10, received its first reading. The amendment stated,

> A member may on[ly] work for one Company covered by the Collective Bargaining Agreement between [SFMCA] and [the Union]. Members are prohibited from working simultaneously at two jobs in the same industry that are covered by the above-mentioned Agreement.

The proposed bylaw amendment was read at a subsequent meeting on September 10. On October 8, the bylaw amendment passed.

On this record, it is undisputed that Serrano was paid no overtime pay by ABMC even though he routinely worked in excess of 40 hours per week when the hours at 425 Market Street and at USF were combined.

It is probable that Rojas discovered that Serrano was working two jobs for ABMC, resulting in his working in excess of 40 hours per week.

In early November 2005, ABMC Project Manager Ricardo Rojas called the Union and spoke with union executive board member and union employee Carmen Cortez about the new bylaw.

Cortez confirmed that the bylaw had been approved.

Rojas told Cortez that he recently learned that Carlos Serrano was working two jobs for ABMC.

Cortez told Rojas that it was up to him.

It is uncontradicted that Ricardo Rojas (Rojas), ABMC project manager at USF, and union executive board member and employee Carmen Cortez (Cortez)[4] spoke by telephone in early November 2005 about the new bylaw. Neither Rojas nor Cortez asserts that Cortez explicitly told Rojas to terminate or remove Serrano from his position with ABMC at USF. All other aspects of their conversation are disputed.

My findings, above, are based on numerous credibility resolutions. For instance, Cortez testified that in early November Rojas called her to ask if it was true that the Union had a new bylaw that prohibited members from having two jobs.[5] Cortez responded that it was true. On the other hand, Rojas testified that in early November 2005, he received a telephone call from Cortez.[6] According to Rojas, Cortez told him that Serrano was working two different jobs and this was contrary to union rules.

To resolve the conflict of who called whom, I turn to the testimony of Union President Olga Miranda (Miranda). I credit her uncontradicted testimony that the bylaw had not been implemented by the Union. No decision had been made regarding fines or other methods of enforcement of the bylaw. In contrast, another bylaw amendment explicitly set forth the fines to be levied. Thus it would appear implausible that Cortez would call Rojas about the impact of the new bylaw. Moreover, even if a method of implementation had been determined, it is highly improbable that of the 2800 members of the Union, Cortez would single-handedly decide that Serrano should be the first member impacted by the bylaw and unilaterally make a call to ABMC to alert them to the bylaw implications for Serrano.[7]

It is more probable that Rojas discovered that Serrano was working for ABMC in excess of 40 hours per week and, upon learning that the Union had passed a bylaw on the subject of members holding two jobs, he called the Union to inquire about the bylaw. Thus I find that Rojas called the Union.

Although Cortez adamantly testified that Serrano's name was not mentioned during the conversation with Rojas, I find to the contrary. After consulting her sworn affidavit, Union President Miranda testified that Cortez told her that Serrano's name

[4] In its answer, the Union admits that Cortez, executive board member, is an agent of the Union within the meaning of Sec. 2(13) of the Act. In addition to being on the executive board, Cortez also worked as an employee of the Union from September through December 2005. She described her duties as answering the phone and helping members. Miranda explained that Cortez was hired by the Union's vice president after Miranda began her maternity leave on September 6, 2005. Miranda noted that Cortez was a "member organizer" and assisted union staff who could not speak Spanish. She also visited buildings with officers of the Union.

[5] Although the parties assumed that the bylaw prohibited Serrano from holding his two jobs, the literal language of the bylaw may not have impacted Serrano's situation.

[6] Although Rojas did not know Carmen's last name, there is no doubt that the person Rojas spoke to was Carmen Cortez.

[7] In this regard, I have taken into consideration Serrano's testimony (denied by Cortez) that he visited the union hall in October to pay his monthly fees. At that time, according to Serrano, Cortez asked him to speak to a group of people. He declined and Cortez became angry and threatened to call the police. Serrano further testified that he left the union hall, took his 5-year old son to his mothers, and returned to the hall to await the arrest threat. After waiting 20 minutes, Serrano went home. Cortez denied that she threatened to call the police regarding any member of the Union. Serrano's scenario makes no sense to me and it is, therefore, discredited.

was mentioned during the conversation. After her recollection was refreshed, Miranda testified that Cortez reported that Rojas told her that Serrano was working at USF during the day. I credit Miranda's refreshed recollection, as set forth in her affidavit, that Serrano's name was mentioned during the Cortez/Rojas conversation, as reported to Miranda by Cortez.

Moreover, Rojas testified that Serrano's name was mentioned during the conversation with Cortez. His testimony corroborates Miranda's refreshed recollection of Cortez' description of the conversation. Thus, I find, based upon the testimony of Miranda and Rojas, that Serrano's name was mentioned during the conversation.

Based upon my credibility resolutions set forth below, I find that Rojas asked if it was true that the Union had a new bylaw that prohibited members from having two jobs. Cortez said it was true. Rojas stated that Serrano was working two different jobs for his company and this was contrary to union rules. Cortez responded, "It's up to you."

According to Cortez, Rojas told her that it had come to his attention that he had "a person that is working two jobs for the company he worked for." Although Cortez denied responding, "It's up to you,"[8] I credit the statement in her sworn affidavit to this effect. As explained in her sworn affidavit, Cortez told Rojas that it was up to him because she thought he was calling the Union to make sure he was not breaking any rule by having an employee work two jobs. As enhanced by her sworn affidavit, I credit Cortez' testimony that she told Rojas it was up to him.

Rojas testified that after Cortez told him that Serrano was in violation of the new bylaw, Rojas asked for something in writing to confirm the bylaw. Rojas identified a document faxed to him by the Union on November 18, as identical to the document faxed to him in early November. Rojas explained that he had either lost the early November faxed document or given it to Serrano. Cortez denied that she faxed the bylaw to Rojas.

I have not credited Rojas' assertion that Cortez told him to fire Serrano or Rojas' testimony that he received a faxed document from Cortez for several reasons including relative demeanor, lack of corroboration, improbability, and internal inconsistency. I found Rojas' attempt to finesse the November 18 document for an earlier document untrustworthy. In this respect, I note that no telephone records, which might have corroborated his testimony, were offered. Finally, on cross-examination, Rojas testified that if the Union told him to fire an employee, he would do so no matter what reason was given. However, he inconsistently admitted that he was aware only that the Union could request the discharge of an employee for failure to pay dues and fees.

On November 4, ABMC told Serrano that, according to the Union, Serrano no longer had a job at USF.

On November 4, Serrano worked his last day for ABMC at USF. According to Serrano, as he was standing in line to punch his card before leaving work on November 4, ABMC Project Manager Rojas told him that Cortez of the Union told Rojas that Serrano did not have a job with ABMC at USF any more.

In basic agreement, Rojas recalled telling Serrano that Carmen from the Union called and told him that according to the union rules, Serrano could not work two different jobs because that would take away opportunities for other members.

Further testimony regarding meetings on November 7 and 9 does not assist in resolving credibility or providing insight into the November 4 events.

According to Serrano, on the following Monday, November 7, he spoke with Cortez at the union hall. Serrano testified that Cortez said that he could not hold two jobs in the same business due to the union rule prohibiting a member from holding two jobs. Serrano made an appointment for Wednesday, November 9, to speak with Miranda, president of the Union.

Cortez testified that when Serrano came to the union hall, he was very upset and said, "I'm here because you told my supervisor to fire me." Cortez told Serrano no. She explained to Serrano that she only told Rojas that the new bylaw had been passed.

Not only does the testimony of Serrano and Cortez conform to their prior testimony regarding the events of November 4, it is also consistent with my finding of fact that Cortez told Rojas that it was up to him.

At the November 9 meeting, according to Serrano, he demanded a layoff letter or a termination letter as well as holiday and birthday pay. Miranda asked who gave Serrano the layoff and he responded that Cortez had done so. At that point, Cortez was asked to join the meeting.

Miranda testified basically in agreement. She recalled that Serrano came to her office and demanded to know why she had removed him. Miranda told Serrano that she did not know he had been removed from 425 Market Street. Serrano explained that he had not been removed from 425 Market Street but, rather, from USF. Miranda said she did not know that he worked there. Serrano told Miranda that Cortez had given an order to have him removed. Miranda countered that Cortez did not have any authority to remove employees from their jobs. Miranda then called Cortez to the meeting.

According to Miranda, she asked Cortez if she had given an order to Rojas to have Serrano removed from his job. Cortez denied that she had done so. Cortez stated that Rojas had called her about a constitutional amendment and she had answered his questions, acknowledging that a change had been made. Cortez told Serrano that she never gave an order to have Serrano removed.

According to Serrano, Miranda told Cortez, "You have been fired. You have been fired." Serrano then observed a power struggle between Miranda and Cortez, Miranda asserting that she was the president and could do what she pleased and Cortez countering that Miranda was not the owner of the Union. In any event, according to Serrano, Miranda explained that it had been a mistake to lay off Serrano. Shouting and crying ensued

[8] I discredit Cortez' awkward attempt to distance herself from her sworn affidavit which clearly states that she told Rojas, "It's up to you" after affirming that the bylaw had been passed. Her affidavit states, "The reason I told [Rojas] that it was up to him was because I thought he was calling the union to make sure he's not breaking any rules by having the employee work two jobs."

and Miranda and Cortez began speaking only in English, which Serrano could not understand. Miranda asked Serrano to leave.

According to another version of Serrano's testimony, this one on cross-examination, Miranda told Serrano that he should be fired because he could not have two jobs. Serrano agreed that one of his affidavits stated that Miranda told ABMC to discharge him. When asked whether it was Miranda or Cortez that told ABMC to fire him, Serrano stated that he did not know. Then on redirect examination, Serrano stated that he was confused and nervous on cross-examination but, actually, Cortez was the one who told ABMC to fire him.

Miranda testified that during the meeting with Serrano, Cortez joined them and explained that she received a call from Rojas asking if there was a constitutional change that members were not allowed to work two jobs. Cortez told him that there was such a change. Although Miranda did not independently recall the remainder of the conversation, after consulting her sworn affidavit, she agreed that she told Cortez that she should not always believe that management supervisors were concerned about violating the contract when they called for information, and that as a union representative, she should question supervisors about asking for information about in-house amendments. Further, Miranda agreed that she told Cortez that she could fire her as a union employee even though she could not remove her from the executive board of the Union. Miranda agreed that Cortez became upset and began crying and that she and Cortez were speaking in raised voices. Although Cortez was later discharged on December 5, Miranda testified that this had nothing to do with the way Cortez handled the telephone call from Rojas.

Cortez testified that when she arrived in Miranda's office, Miranda confronted her with Serrano's assertion that Cortez told Rojas to fire Serrano. Cortez told Miranda that she had already explained to Serrano that she did not tell Rojas to fire Serrano. She only told him that a bylaw had been passed.

Cortez agreed that an argument ensued between Miranda and her. Before Cortez could explain to Miranda that she had not ordered the discharge of Serrano, Miranda ordered Cortez to apologize to Serrano. Cortez refused and the argument ensued. During the argument, Miranda accused Cortez of using the wrong work ethic. Miranda told Cortez that she was the one who gave orders at the Union and she told Cortez that she was fired. None of this testimony assists me in making a determination in this case.

There is no credible evidence of union animus toward Serrano.

In addition to the evidence regarding Cortez' alleged threat to call the police, which I have discredited, after Serrano testified that he could not recall further conversation with Miranda on November 9, he was asked, "When you spoke to her initially, did you complain about what had happened to you being discharged?" He responded that during his meeting with Union President Miranda on November 9, when he explained to her that he had been laid off at USF, she responded in a mocking tone, "because [you] are a shop steward, [you have] the right to hold two jobs." Miranda denied this comment. She testified that she did not know that Serrano held two jobs. She also testified that Serrano was not retained as a shop steward at 425 Market Street when the Union emerged from control by a sister local.

Serrano also testified that approximately 2 months after Miranda's June 2005 election as president, she held a meeting with about 10 employees outside 425 Market Street at the Fremont entrance. Miranda told the assembled employees that she wanted to switch insurance and also convert employees to a 401(k). Serrano testified that he asked her who had requested a change in insurance because the employees were happy with their current insurance. According to Serrano, Miranda responded that Serrano was going to get into trouble. Miranda said she would wait for Serrano in her office. Serrano responded that he never had any problems but his coworkers had problems. Miranda responded in a mocking manner, "He who laughs last, laughs best."

Serrano testified that at a second meeting a few days later with 10 employees held outside at 50 Fremont, the same colloquy between Miranda and Serrano occurred in that she stated she wanted to switch insurance, he stated that no employees had requested a change in insurance, and Miranda responded that Serrano was going to have problems and she would expect him in her office and he who laughs last, laughs best.

Miranda testified that once she was elected president, she did not hold meetings outside the buildings. Prior to her election, she held meetings on the street. She could not recall a date when she held meetings to discuss insurance changes but thought such meetings were probably in 2003, because that was about the time of a decertification election. Later, Miranda stated that the meetings were in June 2005. In any event, Miranda denied that Serrano asked any questions at these meetings and denied that she said Serrano was going to get into trouble. Miranda recalled using the phrase, "he who laughs last, laughs best" in Spanish in addressing all employees, meaning that those who joined the process of collective action would triumph eventually.

Based upon their relative demeanors, the internal consistency of the testimony, and the inherent probability of the accounts, I credit the testimony of Miranda over that of Serrano. Initially, I find it highly improbable that identical exchanges would occur in two consecutive meetings. Secondly, none of the other ten employees was called to corroborate Serrano's testimony regarding the alleged threats made to him by Miranda. Finally, Miranda impressed me as credible in her denial of making such threats to Serrano.

II. ANALYSIS

Section 8(b)(1)(A) and 8(b)(2) of the NLRA provide as follows:

> It shall be an unfair labor practice for a labor organization or its agents (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 . . . or (2) to cause or attempt to cause an employer to discriminate against an employee in violation of [section 8(a)(3)] or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership. . . .

An essential element of any violation of Section 8(b)(1) is restraint or coercion in the exercise of a Section 7 right; i.e., the right to form, join, or assist a labor organization, or to refrain from such activity. Opposition to officers or policies of a labor organization constitutes protected Section 7 activity.[9] The credited evidence, however, fails to reflect that Serrano engaged in Section 7 activity.

An essential element of a violation of Section 8(b)(2) is that the union must cause or attempt to cause discrimination. There is no credible evidence of an express demand from the Union causing Serrano's discharge and thus there is no evidence that the Union directly caused his discharge.

In order to establish an attempt to cause an employer to discriminate against an employee, there must be some evidence of union conduct. "It is not sufficient that an employer's conduct might please the union." *Wenner Ford Tractor Rentals,* 315 NLRB 964, 965 (1994), quoting *Toledo World Terminals,* 289 NLRB 670, 673 (1988). However, where a reasonable inference of a request is supported, direct evidence of an express demand is not necessary. *Avon Roofing & Sheet Metal Co.,* 312 NLRB 499 (1993) (direct evidence of an express demand by the union is not necessary where evidence supports reasonable inference of union request).

The credited evidence reflects that in the context of discussing the Union's bylaw with Rojas, Cortez said only, "It's up to you." There is no reasonable basis upon which to find an inference of an attempt to cause discharge from this statement. Standing alone, the statement "[I]t's up to you" would most reasonably be understood literally; that is, the Union wants no involvement in ABMC's decision.

Moreover, discharge was not a foreseeable consequence of the labor organization's communication, "[I]t's up to you."[10] Serrano's discharge was not a foreseeable consequence of telling Rojas that it is up to him whether to allow Serrano to work at two jobs for ABMC.[11] Taken in context, I conclude that a preponderance of the credible evidence does not establish that the Union attempted to cause the discharge of Serrano.

III. CONCLUSIONS OF LAW

The National Labor Relations Board has jurisdiction of this case by virtue of ABMC's indirect effect on interstate commerce.

ABMC, a corporation with an office and place of business in San Francisco, California, provides services as a janitorial contractor. During calendar year 2005, ABMC provided janitorial services in excess of $50,000 within the State of California, to firms that meet one of the NLRB's jurisdictional standards on a direct basis. Thus, I find that ABMC is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent is a labor organization within the meaning of the NLRA.

Respondent admits and I find that it is a labor organization within the meaning of Section 2(5) of the Act.

A preponderance of the evidence does not support a finding that Respondent restrained or coerced Serrano because of his protected activity.

A preponderance of the evidence does not support a finding that Respondent caused or attempted to cause the Employer to terminate Serrano.

Respondent has not violated the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. November 16, 2006

[9] See, e.g., *Sheet Metal Workers Local 16 (Parker Sheet Metal)*, 275 NLRB 867 (1985), citing *Operating Engineers Local 17 (Combustion Engineering)*, 231 NLRB 1287 (1977).

[10] If a foreseeable consequence of the communication is discharge, an explicit demand to discharge is not required. See, e.g., *Town & Country Supermarkets,* 340 NLRB 1410, 1411 (2004) (union seized upon union dissident's statement, "[N]ext time I see you I'm going to kick your ass. I'm not afraid of you" by reporting this to employer as a threat in violation of employer's handbook knowing that dissident employee would be discharged for making the statement); *Paperworkers Local 1048 (Jefferson Smurfit Corp.),* 323 NLRB 1042, 1044 (1997), enfd. 865 F.2d 251 (3d Cir. 1998) (union's report of racial harassment to employer with full knowledge of employer's rules concerning such conduct, when coupled with union's unsupported statement that African-American employees were upset by remark, supports inference of an implied request that dissident employee be disciplined).

[11] See, e.g., *Laborers Local 158 (Contractors of Pennsylvania),* 280 NLRB 1100 (1986) (knowledge of political dissension within union may have been known to employer but is insufficient to support an inference that union requested discharge of dissident employee).

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.